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SYMPOSIUM: FINAL STATUS FOR KOSOVO: UNTYING THE GORDIAN KNOT

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I. ESSAYS

BETWEEN A ROCK AND A HARD PLACE:
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Resolution for final status for Kosovo will require the participants to steer a course between claims of national sovereignty and those of international guarantees and controls. Negotiation of that status will require the parties to resolve a broad range of issues, ranging from economic and transit matters to the protection of minority rights. Establishment of an international commission to protect minority rights, perhaps modeled on the European Commission on Human Rights under the original form of the European Convention on the Protection of Human Rights and Fundamental Freedoms, may be a useful first step in providing non-adversarial resolution of controversies at an early stage.

POLITICAL DYNAMICS WITHIN THE BALKANS:
THE CASES OF BOSNIA & HERZEGOVINA,
MACEDONIA, BULGARIA, SERBIA,
AND MONTENEGRO *Dr. Lisen Bashkurti* 49

The Essay intends to analyze the regional and local political dynamics within the Balkans and focuses on the most problematic and disputable areas after the Cold War. Through analyses of individual states, bilateral relations, and regional relations, the author gives a broad and complex view of the current and future reconfiguration of the Balkans. Individual cases with contradictory political trends, interstate problems with reciprocal implications, regional "domino effects" of overall solutions, and local and international engagements to support the process in accordance with the modern trend of democratization and integration of the Balkans are included in the Essay's laboratory of approaches in order to throw light on the future of this region.

This Essay is intended as a thought-provoking contribution to an open discussion on Europe's relationship with Kosovo in the future. The main arguments are based on research undertaken by the European Stability Initiative ("ESI") as part of the Lessons Learned and Analysis Unit, a joint project between ESI and the European Union Pillar of UNMIK. More information on ESI and the Lessons Learned and Analysis Unit can be found on www.esiweb.org.

THE INSUFFICIENCY OF INTERNATIONAL LEGAL
PERSONALITY OF KOSOVO AS ATTAINED
THROUGH THE EUROPEAN COURT OF
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The Essay starts with the question whether the idea of a "sovereign state" should wither away in the face of new processes, namely globalization and human rights, processes which are sweeping the world. My conclusion is that the bureaucratic rationale of statehood allows citizens to improve their human rights through participation in a political process. If human rights are not respected, international law would support the national law system that is akin to statehood.

II. LEGISLATIVE REVIEW

PROTECTION OF HUMAN RIGHTS UNDER
KOSOVO'S CRIMINAL CODE AND
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The Criminal Code and Criminal Procedural Code of Kosovo, together with other laws from the fields of criminal and procedural law, provide protection of human rights to all of Kosovo's citizens based on the most advanced international standards of human rights. The Criminal Code of Kosovo increases the number of human rights and freedoms that are protected by law. The most important human rights and freedoms that benefit from this protection are the right to life and security of the person; fundamental rights and freedoms; and the rights to honor, reputation, personal dignity, marriage, family, and health. In the Criminal Code of Kosovo, criminal offenses against human rights and freedoms are gathered in a particular group and some are punished more severely than before. The importance of legal and criminal protection of the human rights and freedoms can be gleaned from this treatment in the Criminal Code.

The Criminal Procedure Code of Kosovo protects the most basic criminal rights, including the right to integrity and human dignity, the right to freedom and individual security, the right to a fair trial, the right to respect for private and family life, and the right to inviolability of residence and correspondence. The most important international and regional standards and documents dealing with human rights and fundamental freedoms are incorporated into the Criminal Procedure Code in order to protect these fundamental rights.

Despite the giant step forward that is represented by the Codes, nevertheless applying these standards requires having a better and more efficient organization of the legal institutions—that is, of the courts, offices of public prosecutors, and police, among others. Currently, there is confusion over the responsibilities of UNMIK versus Kosovar institutions. Moreover, the Codes were not approved by the Kosovo Assembly; the civil administration approved the adoption of the Codes. In order to fulfill one of the most important standards set forth by the international community as a condition for the beginning of negotiations on final status, Kosovar institutions need to be allowed to democratically approve the laws that are imposed on the society and take responsibility for the protection of human rights and fundamental freedoms of its citizens.

III. ARTICLES

RESOLVING CLAIMS WHEN COUNTRIES DISINTEGRATE: THE CHALLENGE OF KOSOVO

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Final status for Kosovo must include a mechanism for resolving claims incident to the breakup of Yugoslavia and the secession of Kosovo from Serbia. Models and theory drawn from other experiences with the dissolution of states provide only partial guidance for Kosovo because the earlier efforts tended to neglect private claims and tended to concern successor states where sovereignty was clearer than it has been during the period of international administration of Kosovo. The most attractive possibility for Kosovo is to establish an international tribunal modeled in part on the Iran and Iraqi claims tribunals, with some decision makers appointed by the local government in Kosovo and some by Serbia, and others appointed by the U.N., the International Court of Justice, and the International Chamber of Commerce. Any acceptable claims dispute resolution machinery for Kosovo must allow private standing to present private claims, and be reinforced by clear rules for freezing assets and for recognition and enforcement by national courts around the world. The machinery must build upon, rather than undermine, existing mechanisms for privatization in Kosovo.

ECONOMIC INTEGRATION AS A MEANS FOR PROMOTING REGIONAL POLITICAL STABILITY: LESSONS FROM THE EUROPEAN UNION AND MERCOSUR

Thomas Andrew O'Keefe, Esq. 187

The Article explores ways to ensure the future economic viability and the territorial integrity of Kosovo, whether as an independent state or as an entity with autonomous powers under the sovereignty of Serbia. The Article discusses the experiences of the European Union and MERCOSUR economic integration projects that have led to permanent peaceful relations among the participating countries, and contributed to overcoming historically bitter rivalries and conflicts. In examining the EU experience, the Article explores how supranational institutions coupled with the concept of subsidiarity have heightened regional autonomy within existing national states and made demands for secession both redundant and obsolete. The Article focuses on lessons that can be gleaned from the EU and MERCOSUR in terms of any effort to integrate the Balkan countries, including the possible establishment of a political union. The Article also posits how an economically integrated Balkans facilitates accession by all the participating states into the EU by providing solutions to at least some of the problems that, if not redressed, will impede their membership indefinitely.

FINAL STATUS OF KOSOVO: THE ROLE OF HUMAN RIGHTS AND MINORITY RIGHTS

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In view of the massive human rights violations experienced in Kosovo, the reconstruction of society and the final status of the territory have to be based on human rights and minority rights. Besides universal human rights instruments, European regional standards are of particular importance as Kosovo wants to be fully integrated into Europe. The Article identifies the relevant European and international standards and procedures and finds shortcomings with regard to guarantees on economic, social, and cultural rights, which are an indispensable element of human security.

It then compares the role given to human and minority rights in the Constitutional Framework of Kosovo with the reality of a lack of protection as reflected in the reports of the Ombudsperson. Among the problems identified are also the lack of accountability of UNMIK in view of its immunity and the lack of access to the protection mechanism of the European Convention on Human Rights, although Serbia and Montenegro has ratified the Convention.

The Article further analyzes the role of human and minority rights in the Kosovo Standards Implementation Plan ("KSIP"), which aims at a "truly multi-ethnic, stable

and democratic Kosovo, which is approaching European standards." Human and minority rights are given a major role in the plan, but the budgetary consequences and the question of human resources do not seem to be properly addressed.

The creation of a "culture of human rights" based on confidence in the rule of law that is needed for the full implementation of the KSIP requires increased efforts of education and training in human rights and minority rights on a wide scale. For this purpose, local institutions that can contribute to these aims, such as human rights centers, need to be strengthened. Furthermore, the responsibilities of the Provisional Institutions of Self-Government of Kosovo should be extended to the crucial areas of justice and law enforcement. As the protection of human and minority rights is a key function of any state vis-à-vis its citizens, their strengthening is a way of moving Kosovo closer to statehood.

HUMAN RIGHTS, SOVEREIGNTY, AND THE FINAL STATUS OF KOSOVO

Bartram S. Brown 235

The final political status of Kosovo is ultimately a human rights issue, and a just and viable solution must balance the sovereignty and territorial integrity of Serbia with the human rights of Kosovar Albanians. A century ago Woodrow Wilson publicly endorsed self-determination as a fundamental principle linked to the equal rights of all peoples. Today it is broadly accepted as one of the essential principles of contemporary international law. Despite this exalted normative status, the principle of self-determination is limited by its inherent ambiguities.

Self-determination is a group right, to be exercised only by peoples, but there is no clear standard on how to define an eligible "people." Even if Kosovar Albanians do constitute a people, they might still only be entitled to internal forms of self-determination, involving a degree of self-government within Serbia. International law neither demands, nor excludes, the possibility of independence for Kosovo. It does, however, require an outcome consistent with the fundamental human rights of all concerned as well as with the maintenance of international peace and security.

Determining Kosovo's final political status will be inherently difficult. No one relishes the prospect of compromise on sensitive issues of sovereignty, but only negotiations without unrealistic preconditions can fully explore the possibilities for compromise and agreement. A negotiated solution will require outside political intervention by the Security Council and key states. So far that intervention has come principally in the form of mediation and political guidance. The message in that guidance, both for Kosovo and for Serbia, is that both groups should engage in a realistic and meaningful dialogue. Should the parties fail to reach agreement, the Security Council, acting to protect international peace and security, might eventually have to assume responsibility for deciding upon Kosovo's final political status. There is little reason to believe that an externally imposed solution would satisfy Albanians, Serbs, or any of the other parties. For their own self-interest, these parties should accept responsibility for negotiating their own future.

THE EUROPEAN UNION AND THE FINAL STATUS FOR KOSOVO

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and Gregory Cheikhamegyaz

This Article presents the current policy of the European Union toward the final status for Kosovo—"Standards before Status"—and analyzes potential future developments of the EU's final status position. The March unrests in Kosovo caused a split among the EU institutions, and the reactions of the EU institutions in response to the unrests have varied. Nonetheless, the March unrests may have been the catalyst for a new discussion within the EU about Kosovo. This Article asks which of the EU institutions is the most important decision maker and determines that, of all of the EU institutions that assume different powers within EU's Common Foreign and Security Policy, the European Council enjoys the most authority. This Article then analyzes seven potential statuses for Kosovo and evaluates the pros and cons, from an EU perspective, of each solution. Finally, the national positions of Germany, France, the United Kingdom, and Greece are taken into consideration in order to determine what statuses are the most probable for the short and long term.

SELF-DETERMINATION UNDER THE TERMS OF
THE 2002 UNION AGREEMENT BETWEEN SERBIA
AND MONTENEGRO: TRACING THE ORIGINS
OF KOSOVO'S SELF-DETERMINATION

Enver Hasani, PhD 305

State building of the union between Serbia and Montenegro represents the biggest challenge for peace and stability in the Balkans and beyond, with the issue of an unsettled Kosovo as an everlasting indicator of that challenge. The USM Agreement alone is not enough to produce the desired results. Only an overall, nonterritorial restructuring of Kosovar society along the principles and norms of the rule of law, democracy, and the respect for human and minority rights can produce the desired results. An approach based on new internal territorial divisions, such as the ongoing process of decentralization, can only further exacerbate the situation by reviving old and bitter memories of self-determination as a phenomenon associated with violence and cruelty, leaving Kosovo a less secure region of the Balkans.

In response to this challenge, I argue that state building in the newly established Union of Serbia and Montenegro might take the same path as in the countries in Africa or South Asia following their decolonization in the 1960s and 1970s. The lessons of state building in Africa and South Asia can inform the process in the USM. This is not to say that the process will not be without difficulties, some of which are already obvious—the decentralization of Kosovo and the strained dialogue among Albanians and Serbs are examples.

I also argue that the USM Agreement was signed not to prevent Montenegro's secession, but Kosovo's outright independence. The price that will be paid for this new path is unclear. Although the Balkan region seems stabilized for now, the region likely will not remain stable because Kosovars and Albanians most likely will be those disillusioned in the new Balkans, a region purporting to emulate Western and liberal values of political organization, including multicultural and multiethnic coexistence. Whether this disillusion of Albanians will translate into an aggressive and violent movement remains to be seen.

THE LEGAL AND POLITICAL GROUNDS FOR,
AND THE INFLUENCE OF THE ACTUAL SITUATION
ON, THE DEMAND OF THE ALBANIANS OF
KOSOVO FOR INDEPENDENCE

Hajredin Kuçi 331

The Article argues in support of the Kosovar Albanians' right to independence and self-determination. By examining the ancient and recent ethnic history of these people and their neighbors, particularly the Serbs, the author brings to light the shared beliefs within each group. Then by examining developments since the dissolution of the Federal Republic of Yugoslavia, through the lenses of international law and politics, the author analyzes the building blocks of sovereign statehood: defined borders, governmental institutions, and international recognition.

SOME KEY PRINCIPLES FOR A LASTING
SOLUTION OF THE STATUS OF KOSOVA:
UTI POSSIDETIS, THE ETHNIC PRINCIPLE,
AND SELF-DETERMINATION

Zejnullah Gruda, PhD 353

Five years after the end of the conflict in Kosova, final status remains an object of discussion. The author elaborates several options that have been proposed by analysts, diplomats, and various forums. The author argues that final status must be based on the factors that influence the creation of states and on the principles behind any democratic and just solution concerning statehood: *uti possidetis*, the ethnic principle, and the right to self-determination.

STUDENT NOTES AND COMMENTS

A STRATEGY FOR RENEWING FRANCHISE NEGOTIATIONS IN KOSOVO

Matthew V. Topic 397

A group of Kosovar entrepreneurs recently attempted to purchase a franchise of a U.S. business. While the presence of such a business would benefit Kosovar economic development, the Kosovar entrepreneurs were quickly denied by the U.S. company. It is unclear, however, whether U.S. trademarks are protected against unauthorized use in Kosovo, either under U.S. or Kosovar law, and it is possible that the entrepreneurs could use the franchise mark regardless of the rejection.

This Note explores the consequences of such unauthorized use. It examines both the uncertain nature of Kosovar trademark law and the nuances of extraterritorial application of the U.S. Lanham Act. The Note also examines forum and conflict of laws issues that would frustrate attempts to litigate alleged trademark rights either in Kosovo or the U.S. The Note concludes that protection against the unauthorized use of U.S. trademarks in Kosovo is sufficiently unclear such that use by the Kosovar entrepreneurs might persuade the U.S. business to reopen negotiations.

VICTOR'S NOT SO LITTLE SECRET: TRADEMARK DILUTION IS DIFFICULT BUT NOT IMPOSSIBLE TO PROVE FOLLOWING

MOSELEY v. V. SECRET CATALOGUE, INC. Jessica C. Kaiser 425

The Supreme Court's decision in *Moseley v. V. Secret Catalogue, Inc.* has been criticized by those who favor strong federal dilution protection and applauded by those who dislike dilution protection. Critics of dilution favor weak antidilution provisions because dilution begins to protect trademarks as pure property rights. In *Moseley*, the Supreme Court resolved a circuit split over the appropriate interpretation of the Federal Trademark Dilution Act ("FTDA"), and the Court determined that the FTDA requires that famous mark holders show "actual dilution." This Note examines the impacts of this decision and advises ways that famous mark holders can obtain relief under the FTDA post-*Moseley*.

THE DESIGNATION OF "DISTINCT POPULATION SEGMENTS" UNDER THE ENDANGERED SPECIES ACT IN LIGHT OF NATIONAL ASSOCIATION OF HOMEBUILDERS v. NORTON

Katherine M. Hausrath 449

The term "distinct population segment" in the Endangered Species Act has no defined scientific meaning. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service have jointly promulgated a policy requiring a distinct population segment to be both: (1) discrete and (2) significant. However, the implementation of this policy has led to inconsistent listing decisions and the failure to list distinct populations of species that require protection under the Endangered Species Act. These problems are clearly illustrated in *National Association of Homebuilders v. Norton*, in which the plaintiffs sued the U.S. Fish and Wildlife Service in district court, alleging that the decision to list the Arizona population of the cactus ferruginous pygmy-owl as a distinct population segment was "arbitrary and capricious." The district court upheld the listing, finding that the Arizona population constituted a distinct population segment of the species. On appeal, the Ninth Circuit reversed and held that while the Arizona pygmy-owl was distinct, it was not significant to the species. In order to avoid such judicial reversals of agency decisions, a clearer and more consistent standard of designation should be implemented. This standard should include: (1) an Evolutionary Unit standard, which would include all of the current factors for discreteness and de-emphasize the significance factors; (2) a requirement that the distinct population be a minimum viable population; (3) a uniform standard of proof requirement; and (4) the precautionary principle for reviewing distinct population segment listing decisions.

TAKE IT OR LEAVE IT: *MONSANTO V.*
McFARLING, BOWERS V. BAYSTATE
TECHNOLOGIES, AND THE FEDERAL
CIRCUIT'S FORMALISTIC APPROACH TO
CONTRACTS OF ADHESION

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The Federal Circuit has been widely criticized for unrelenting formalism. Perhaps because Congress charged the court with establishing national uniformity in areas of the law where uniformity was lacking, the Federal Circuit has often expressed a significant preference for bright-line rules. According to many critics, this preference has come at the expense of fairness. In two relatively recent decisions, the Federal Circuit has expanded its formalism into the area of contracts of adhesion, a topic it had not had the opportunity to consider before. This Note examines those two decisions, the formalistic approach taken by the Federal Circuit, and the less formal approaches taken by other courts. By examining those other approaches and taking into account relevant intellectual property policy, the Note proposes a less formal, factor-based approach to cases dealing with contracts of adhesion.

THE DIGITAL MILLENNIUM COPYRIGHT ACT
AND NON-INFRINGEMENT USE: CAN MANDATORY
LABELING OF DIGITAL MEDIA PRODUCTS
KEEP THE SKY FROM FALLING?

Michael P. Matesky, II 515

Throughout the history of the United States, copyright law, the fair use doctrine, and other non-infringement doctrines have limited copyright holders' right to prevent certain uses of their works. Nowadays, however, copyright holders can prevent users from engaging in non-infringing use of works on digital media by incorporating technological protection measures, such as an encryption code that prevents a CD from being played on a personal computer. Furthermore, the Digital Millennium Copyright Act prohibits circumvention of a technological protection measure that "effectively controls access" to a copyrighted work. This combination of new technological and legal tools gives copyright holders the de facto ability to prevent fair use and other non-infringing uses if such uses would require circumvention of an access-control measure.

To combat the negative effects of this new techno-legal paradigm, sellers of digital media products should be required to label their products at the point of purchase, clearly disclosing any technological protection measures incorporated into their products and the uses that such measures prevent or limit. Such a regulatory system would discourage industrial copyright holders from abusing their newly realized power to prevent non-infringing use of their works, increase the efficiency of the digital media marketplace and its responsiveness to consumer needs, and protect reasonably developed consumer expectations regarding non-infringing uses of purchased digital media products.

